No. 89-1307

In the Supreme Court of the United States

OCTOBER TERM, 1989

MR. W FIREWORKS, INC., PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that petitioner's roadside fireworks stands are not "amusement or recreational establishment[s]" exempt from the Fair Labor Standards Act of 1938 under 29 U.S.C. 213(a)(3).

2. Whether the district court acted within its discretion in denying petitioner's motion to amend its answer to assert a new statutory exemption defense more than four years after the complaint was filed and seven months after the district court had considered and rejected petitioner's other exemption defenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 889 F.2d 543. The opinions, orders, and judgment of the district court (Pet. App. A21-A52) are unreported. A prior opinion of the court of appeals in this case is reported at 814 F.2d 1042, cert. denied, 484 U.S. 924 (1987).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1989. The petition for a writ of certiorari was filed on February 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a corporation that owns and operates over one hundred roadside fireworks stands throughout

southern Texas (Pet. App. A2). Its business is seasonal because Texas law permits fireworks to be sold only for 11 days ending on the Fourth of July, and for 13 days ending on New Year's Eve (*id.* at A33; 814 F.2d at 1045). Petitioner's stands are located at scattered sites along public highways (Pet. App. A24). The stands are engaged solely in the retail sale of goods, primarily fireworks, for use by customers at locations "substantially removed from and functionally unrelated to" the stands themselves (*id.* at A9, A24). None of the stands is part of a larger recreational area, and none provides any amusement or recreational services (*id.* at A24).

2. The Secretary of Labor brought suit against petitioner in November 1983, alleging violations of the minimum wage, overtime, and recordkeeping provisions of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 201 *et seq.* (Pet. 6; 814 F.2d at 1043). Petitioner's original answer, filed in December 1983, asserted that its stand operators are independent contractors not covered by the FLSA (R. 230-234). In May 1985, the district court allowed petitioner to amend its answer to claim two statutory exemptions, one for "outside salesm[e]n," 29 U.S.C. 213(a)(l), and a second for seasonal "amusement or recreational establishment[s]," 29 U.S.C. 213(a)(3) (R. 291, 325-326).

The district court, following a trial, issued an opinion holding that the fireworks stand operators are independent contractors and declining to reach the two exemption defenses (Pet. 7; 814 F.2d at 1055). In April 1987, the court of appeals reversed on the independent contractor question and remanded for consideration of the two asserted exemptions (814 F.2d 1042); this Court denied a petition for a writ of certiorari (484 U.S. 924 (1987)).

On remand, the district court rejected petitioner's argument that its fireworks stands are "amusement or recreational establishments" exempt from the wage and hour pro-

visions of the FLSA (Pet. App. A21-A24). The court, applying *Brennan* v. *Texas City Dike & Marina, Inc.*, 492 F.2d 1115, 1118 (5th Cir.), cert. denied, 419 U.S. 896 (1974), stated that the Section 213(a)(3) exemption "does not cover establishments whose sole or primary activity is selling goods, unless the enterprise is an integral part of a supervised, geographically delimited recreational area or establishment" (Pet. App. A23). The court found that petitioner's stand operators "exclusively engage in the sale of merchandise, primarily fireworks[,]" and that the stands "are located at various points on the side of a highway and are not part of any larger amusement area" (*id.* at A24).[1]

Seven months later, as the parties were preparing for a scheduled hearing on damages, petitioner filed a motion under Fed. R. Civ. P. 15(a) to amend its answer to assert, for the first time, that its fireworks stand operators are highly compensated "administrative personnel" exempt from the FLSA pursuant to 29 U.S.C. 213(a)(1) (Pet. App. A10-A11). The district court denied the motion as untimely, observing that the defense "could have been presented either before trial or at the time the other exemptions were addressed on remand" (*id.* at A29).[2] Following the damages hearing, petitioner again attempted to assert the administrative employee exemption, this time in a motion to amend its answer to conform to the evidence pursuant to Fed. R. Civ. P. 15(b) (Pet. App. A11). The district court

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[1] The district court also rejected petitioner's argument that its stand operators are outside salesmen within the meaning of the FLSA (Pet. App. A25-26). Petitioner abandoned that argument on appeal (*id.* at A4 n.1).

[2] The court added: "Defendant waited until discovery on the damages phase was completed and the case was set for trial before asking to amend. The liability phase is over and only damages remain to be determined" (Pet. App. A29-A30).

denied the motion "[f]or reasons previously expressed" (*id.* at A31). That same day, the court entered judgment for the Secretary, restraining petitioner from withholding compensation from its employees in the amount of some $225,000 plus interest, and permanently restraining future violations of the Act's minimum wage, overtime, and recordkeeping provisions (*id.* at A50-A51).

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings.[3] The court, relying on its earlier decision in *Brennan* v. *Texas City Dike & Marina, Inc.*, *supra*, affirmed the district court's holding that petitioner's fireworks stands are not an exempt amusement or recreational establishment (Pet. App. A9). The court explained that the legislative history of Section 213(a)(3) "suggest[s] the exemption was not intended to cover establishments whose sole or primary activity is selling goods," unless those sales are intended for consumption in a "geographically delimited recreational area," such as concessions at golf courses, baseball parks, amusement parks, racetracks, summer camps, and national parks (Pet. App. A7-A8 (citing 492 F.2d at 1118-1120)). Noting that petitioner conceded FLSA coverage of "the various other roadside stands common throughout Texas (*i.e.*, purveyors of fruit, vegetables, seafood, tamales, flags, bird houses, games, toys, portraits of Elvis on black velvet, etc.)," the court found nothing to distinguish petitioner's fireworks stands from "retailers of other seasonal and recreational items," and observed that petitioner's approach "would result in the exemptions swallowing the rule" (Pet. App. A8-A9).

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[3] The court reversed the back pay award and remanded for more detailed findings on how to credit so-called "cash advances" by which stand operators kept some cash receipts for themselves as an advance on their end-of-season commissions (see Pet. App. A13-A20).

The court of appeals further held that the district court did not abuse its discretion in denying petitioner's motions to amend its answer to assert the "administrative personnel" exemption of 29 U.S.C. 213(a)(1) (Pet. App. A10-A13). Regarding the Rule 15(a) motion, the court noted that petitioner waited more than seven months after the district court rejected its other exemption defenses before moving to amend, and that petitioner's motion "is simply an effort to try the matter of exemptions once more" (Pet. App. A10-A12). The court viewed petitioner's Rule 15(b) claim as "equally meritless," because the Secretary did not give actual consent to try the "administrative personnel" exemption, and no consent could be inferred from the Secretary's failure to object to evidence that was relevant to other issues at trial (Pet. App. A12). The court concluded that "[n]o good cause was established for the distinctly belated raising" of the administrative personnel exemption, and held that the district court did not abuse its discretion in denying petitioner leave to amend (*id.* at A13).

ARGUMENT

The court of appeals' resolution of the FLSA exemption issue is correct and does not conflict with any decision of this Court or any other court of appeals. The court of appeals also was correct in its fact-bound holding that the district court did not abuse its discretion in denying petitioner's motion to amend its answer.

1. This Court has said that "broad coverage is essential to accomplish [the FLSA's] goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency." *Tony & Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290, 296 (1985). Accordingly, the Court repeatedly has held that exemptions to the FLSA are to be narrowly construed and should not

be extended beyond "those plainly and unmistakably within [their] terms and spirit." *Citicorp Indus. Credit, Inc.* v. *Brock*, 483 U.S. 27, 35 (1987) (quoting *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945)). The employer bears the burden of proving entitlement to an exemption. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 393, 394 n.11 (1960). The courts below correctly applied these principles in rejecting petitioner's attempt to expand the category of amusement and recreational establishments to include retailers of "recreational" goods.

a. Section 13(a)(3) of the Fair Labor Standards Act of 1938, 29 U.S.C. 213(a)(3), exempts from the Act's minimum wage and overtime requirements employees of "an amusement or recreational establishment[,] organized camp, or religious or non-profit educational conference center" operated on a seasonal basis.[4] Although the statute does not define "amusement or recreational establishment," the accompanying references to camps and conference centers indicate that Congress did not intend to create a broad ex-

[4] Section 13(a)(3) exempts from 29 U.S.C. 206 and 207:

> [A]ny employee employed by an establishment which is an amusement or recreational establishment[,] organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture.

29 U.S.C. 213(a)(3).

emption for sellers of "recreational" goods. Petitioner's position is further undermined by the existence of a separate statutory exemption for retailers, enacted at the same time as the original version of Section 13(a)(3), for employees of certain "retail or service establishment[s]" that make over half their sales in a single state and whose total sales do not exceed specified dollar limits. § 13(a)(2), 29 U.S.C. 213(a)(2). Congress plainly intended the exemption of Section 13(a)(2) to apply to retailers, but petitioner has never claimed to fall within its dollar limits.

The legislative history contains additional evidence that Congress intended to create only a limited exemption for parks and similar recreational facilities. The exemption originated in the 1961 amendments to the FLSA that first extended coverage to the retail sector. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9, 75 Stat. 71. As the committee report explained, "[t]hese establishments are typically those operated by concessionaires at amusement parks and beaches and are in operation for 6 months or less a year." S. Rep. No. 145, 87th Cong., 1st Sess. 28 (1961). In 1966, Congress moved the exemption for amusement or recreational establishments to a new, separate Section 13(a)(3). Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 202, 80 Stat. 833. A House report on a similar provision stated that it "is intended to exempt from overtime requirements such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sports events, parimutuel racing, [and] sport boating or fishing * * *." H.R. Rep. No. 871, 89th Cong., 1st Sess. 35 (1965).[5] Senator Yarborough, the bill's floor manager,

[5] As noted by the Fifth Circuit in *Brennan* v. *Texas City Dike & Marina, Inc.*, 492 F.2d at 1118 n.8, H.R. Rep. No. 871, *supra*, discussed H.R. 10518, 89th Cong., 1st Sess. (1965), an unenacted bill. The committee's examples of exempt amusement activities are instructive,

in successfully opposing an amendment to extend the Section 13(a)(3) exemption to resort hotels, described the exemption as intended only "for amusement parks." 112 Cong. Rec. 20,791 (1966).[6]

The Court of Appeals for the Fifth Circuit carefully reviewed the statute and its legislative history and correctly concluded that Section 13(a)(3) does not confer a broad exemption on retail establishments whose "sole or primary function is the sale of recreational goods." *Brennan* v. *Texas City Dike & Marina, Inc.*, 492 F.2d at 1118. The court, drawing on opinion letters of the Department of Labor's Wage and Hour Administrator, concluded that the only retail sales enterprises entitled to an exemption under Section 13(a)(3) are those which are "an integral part of a supervised, geographically delimited recreational area." 492 F.2d at 1119 (footnote omitted). Applying those principles here, the court properly held that petitioner's roadside fireworks stands are not exempt. Because petitioner's sole activity is the sale of goods for use outside a defined recreational area, permitting it and similarly situated vendors to claim an exemption would indeed "result in the exemptions swallowing the rule." Pet. App. A8-A9.

b. Contrary to petitioner's assertions (Pet. 13-17), the decision of the court of appeals does not conflict with any other decision of a court of appeals. On the contrary, its

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however, because the following year the same Congress enacted into law language quite similar to that of H.R. 10518, *supra*. Compare 29 U.S.C. 213(a)(3) with H.R. Rep. No. 871, *supra*, at 35.

[6] The Secretary's interpretive regulations, first promulgated in 1970, 35 Fed. Reg. 5856 (1970), list as "[t]ypical examples" of amusement or recreational establishments "concessionaires at amusement parks and beaches." 29 C.F.R. 779.385 (citing legislative history). The Secretary's interpretive regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

decision follows directly from *Brennan* v. *Texas City Dike & Marina, Inc.*, *supra*, which held that a marina located on the Gulf of Mexico that "derived most of its income from boat, motor, and trailer sales" was not exempt from FLSA coverage (Pet. App. A6-A7). The other appellate decisions cited by petitioner address issues not presented by this case. This case does not involve the question whether an establishment not accessible to the general public, such as a country club, may qualify as an exempt "amusement or recreational establishment." See *Brock* v. *Louvers & Dampers, Inc.*, 817 F.2d 1255 (6th Cir. 1987). Nor is it pertinent to this case whether the Section 13(a)(3) exemption turns on the nature of the employer's business or the nature of the employee's work (see Pet. 16, comparing *Marshall* v. *New Hampshire Jockey Club, Inc.*, 562 F.2d 1323 (1st Cir. 1977), with *Brennan* v. *Six Flags Over Georgia, Ltd.*, 474 F.2d 18 (5th Cir.), cert. denied, 414 U.S. 827 (1973)). Here, the employer's business and the employee's work are one and the same — the retail sale of fireworks. Similarly, any potential conflict between an "income test" and a "primary activity" test (see Pet. 15) does not arise in this case, because the sale of fireworks is petitioner's primary activity as well as its primary source of income.[7]

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[7] The district court decision cited by petitioner (Pet. 13), *Donovan* v. *Fairfield Bay Community Club, Inc.*, 100 Lab. Cases (CCH) ¶ 34,511 (E.D. Ark. 1983), is entirely consistent with the holdings in this case and in the *Texas City* case. The marina at issue in the *Fairfield Bay* case was "an integral part of a 'supervised, geographically delimited recreational area,' " and derived only seven percent of its income from boat, motor, and trailer sales. *Id.* at 46,093-46,094. Similarly, the state court decision cited by petitioner (Pet. 13-14, citing *Webb* v. *Music City Serv., Inc.*, 85 Lab. Cases (CCH) ¶ 33,738 (Tenn. Ct. App. 1978)), is consistent with the court of appeals' ruling. *Webb* held that a bus service did not qualify as an amusement or recreational establishment because it did not operate wholly within a national park or other recrea-

2. Once a responsive pleading has been served, a party may amend a pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). In *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), this Court stated that a trial court is justified in denying leave to amend in instances of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Grant or denial of a motion to amend a pleading is reviewable only for abuse of discretion. *Ibid.*

The lower courts' refusal to permit amendment in this case is a fact-bound application of settled principles not meriting review by this Court. The district court, moreover, acted well within its discretion. Petitioner plainly was dilatory and delayed unduly in seeking leave to amend. Petitioner had access to all relevant facts about its own business operations from the outset of this litigation in 1983. The "administrative personnel" exemption is in the same subsection of the Act, 29 U.S.C. 213(a)(1), as the "outside salesman" exemption claimed by petitioner in its first amended answer in May 1985.[8] Petitioner nevertheless

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tional area, and because it provided transportation unconnected with tours or sight-seeing. *Id.* at 48,534-48,535.

[8] Section 13(a)(1) excludes from coverage under the FLSA:

> *[A]ny employee employed in a bona fide executive, administrative, or professional capacity* (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), *or in the capacity of outside salesman* (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative

waited to assert the new exemption defense until more than four years after the complaint was filed, almost ten months after the first court of appeals decision was issued, and seven months after the district court, on remand, had rejected its other exemption defenses. The court of appeals properly concluded that "[n]o good cause was established for the distinctly belated raising of the * * * [administrative employee] exemption claim," and that petitioner's motion was "simply an effort to try the matter of exemptions once more" (Pet. App. A12-A13). In such circumstances appellate courts regularly affirm the denial of motions for leave to amend pleadings. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 327 & n.1, 332 (1971); *Sandcrest Outpatient Servs.* v. *Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1148-1149 (4th Cir. 1988) (Powell, Cir. J.); *Federal Ins. Co.* v. *Gates Learjet Corp.*, 823 F.2d 383, 387 (10th Cir. 1987); *Evans* v. *Syracuse City School Dist.*, 704 F.2d 44, 46-47 (2d Cir. 1983). This Court has looked with disfavor on motions to amend that belatedly raise new theories where, as here, the circumstances suggest that the moving party "knew exactly what it was doing in not presenting [the new] argument during trial and * * * realized a need to present [the new theory] only after it learned that its original arguments had not induced the court to hold in its favor." *Zenith Radio Corp.*, 401 U.S. at 332-333.

Petitioner incorrectly suggests that no "employee-oriented exemption" could be applicable until after this Court denied certiorari on the independent contractor issue in November 1987 (Pet. 27-28 n.4). The Federal Rules of Civil Procedure

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capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities).

29 U.S.C. 213(a)(1) (emphasis added).

expressly encourage parties to plead in the alternative by stating "as many separate claims or defenses as the party has regardless of consistency." Fed. R. Civ. P. 8(e)(2). Petitioner availed itself of the provision for alternative pleading by amending its complaint in 1985 to assert two "employee-oriented" exemptions, while simultaneously asserting that its stand operators were independent contractors rather than employees.[9]

Finally, petitioner is wrong in claiming that the courts below failed to state their reasons for denying the motion to amend (Pet. 24-27). Both the district court (Pet. App. A28-A30) and the court of appeals (*id.* at A10-A12) adequately explained their reasoning. The district court noted that the parties had been ordered to brief the exemption defenses in June 1987, that the court had ruled against petitioner on the exemption issues in July, and that "[s]ince that time, the parties have been preparing for the damage phase of the trial" (*id.* at A28-A29). The district court found that the new defense "could have been presented either before trial or at the time the other exemptions were addressed on remand" (*id.* at A29). The court of appeals affirmed because the "motion, pared to its fundamentals, is simply an effort to try the matter of exemptions once more" (*id.* at A12). Thus the reasoning of both courts satisfies the requirements of *Foman*, and petitioner's arguments to the contrary do not warrant review by this Court.

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[9] Petitioner does not seek review of the denial of its motion under Fed. R. Civ. P. 15(b) to amend its pleadings to conform to the evidence. The courts below properly refused to permit amendment under this rule because the administrative employee exemption issue was not tried by "express or implied consent" of the Secretary. See *ibid.*; Pet. App. A12-A13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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